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IN THE

Supreme Court of the United States

October Term, 1967

No. 66

CASE-SWAYNE CO., INC.,

Petitioner,

vs.

SUNKIST GROWERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT SUNKIST GROWERS, INC.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT SUNKIST GROWERS, INC.

STATUTES INVOLVED.

This case involves the construction of Section 1 of the Capper-Volstead Act (7 U.S.C. §291), which has been quoted only in part by the Petitioner. It provides in full as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of

persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

THE QUESTION PRESENTED.

Are the fruit growers who have joined together in the Sunkist System for the cooperative marketing of their fruit entitled to the protection of the Capper-Volstead Act, notwithstanding the fact that 14.91% by number, and 12.94% by volume of the packing houses within the Sunkist System, through which these farmers ship their fruit to market, are private businesses, some of which are engaged in the production of oranges and some of which are not so engaged, but none of which participates in either the gain or loss involved in cooperative marketing of the growers fruit?

Comment.

The Capper-Volstead Act, quoted above, provides that farmers may act together in associations in collectively processing, preparing for market, handling, and marketing their products. The Act contains a number of restrictions, and requires that such associations must be operated for the benefit of the "members thereof, as producers."

The Capper-Volstead Act does not provide, however, as contended by the Petitioner, that farmers may not act together in cooperatively processing and marketing their farm products, merely because some non-producers are members of the association. The question before this Court is whether such a restriction should be read into the Act by implication. That determination should depend upon the effect of such membership, not upon the mere existence of such membership.

The Petitioner asserts that there is a defect in the form of the Sunkist organization because agency associations are "members." Since October 31, 1958 (when Sunkist, Exchange Orange Products Co. and Exchange Lemon Products Co. were merged, and Sunkist adopted its Amended Articles of Incorporation and Bylaws) agency associations have been members of the Sunkist System. [R. 131.] Petitioner, however, makes no examination whatsoever into the nature or effect, economic or otherwise, of these agency association memberships.

Sunkist contends that the Act is concerned with who gets the benefits of collective marketing, not who is called a "member."

As we will show in the following paragraphs, the agency associations which the Petitioner attacks are engaged in an essential cooperative marketing function, the preparing of fruit for market, pursuant to contracts with growers. [R. 36.] As provided in the Stipulation of Facts, these packing houses do not benefit in any way from cooperative marketing by the Sunkist System, except for the fees which they receive for their packing services. [R. 36.] Aside from this, the entire gain or loss of cooperative marketing through Sunkist devolves upon the growers. [R. 36.]

STATEMENT OF THE CASE.

A. The Sunkist Organization Is a Federated Cooperative System Through Which the Citrus Growers of California and Arizona Process and Market Their Fruit.

The Sunkist System is designed to accomplish the purposes of the Capper-Volstead Act. The Sunkist System antedates the Act by many years. It was begun in the 1890s [R. 39], and developed gradually up to 1920 when its corporate and functional pattern was established. [R. 41; see paragraph 9 of the Stipulation of Facts for this historical and functional development, R. 37-43]. By 1922, when the Capper-Volstead Act was adopted, the Sunkist System was an established example of cooperative marketing which Congress looked on with approval. (Appendix, pp. 15-21.)

The Amended Bylaws of Sunkist Growers, Inc., set forth the following declaration of purpose:

> "The fundamental purpose of the Sunkist System is to market the growers' citrus fruit in the form received, or in manufactured or other form

at the highest return to such growers consistent with their long term interests. In carrying out such purpose, Sunkist shall act as a nonprofit cooperative marketing association." [R. 130.][1]

1. Sunkist Growers, Inc.

Sunkist Growers, Inc., is the marketing agent for the Sunkist System. [R. 39.] The Bylaws of Sunkist provide that all of the fruit within the Sunkist System shall be marketed through the facilities of Sunkist, and that Sunkist

> ". . . shall determine the methods of marketing to be adopted in any or all markets and the types of containers and methods of packaging to be used." [R. 144.]

The Bylaws further provide that each of the packing houses (including the agency associations which are at issue in this case)

> ". . . appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of its fresh fruit, and the processing and marketing of its products fruit[2]. Full power and authority are conferred upon Sunkist as such agent to conduct its marketing activities in such manner

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[1]Similar declarations of purpose are set forth in Sunkist's Amended Articles of Incorporation, adopted October 31, 1958 [R. 124], and in Sunkist's 1916 Articles of Incorporation. [R. 73.]

[2]Products fruit is the fruit which is involved in this case. It is fruit which, because of its small size, or due to the scarring of its skin, or for other reasons, is not sold in the fresh fruit market, but instead is used to make canned or concentrated orange juice, or other orange products.

as it, in its sole discretion, determines to be for the best interests of all of its members." [R. 144-145.][3]

Sunkist has adopted a general marketing plan for the marketing of oranges which applies to all oranges within the Sunkist System, whether they are supplied through cooperative associations, or agency associations. [Bylaws, para. 9.3, R. 145.][4]

Fresh fruit and products fruit are handled differently in the Sunkist System. This case involves products fruit. Sunkist is given general power to market all of the products fruit within the Sunkist System. [R. 149.] The Bylaws specifically provide that no member shall exercise any control over Sunkist with regard to either the processing or marketing of products fruit, or the conduct of the business of Sunkist. [R. 149.] Sunkist is given power in its discretion to establish pools for the processing and marketing of products fruit in which the identity of any particular lot of fruit furnished by a packing house will be lost. [R. 149.] Sunkist has the duty to provide for the equitable handling of freight charges on all products fruit, so that no shipper will be at a disadvantage by reason of his location *vis-a-vis* the Sunkist processing facilities. [R. 150.] Sunkist is obligated to return all proceeds of sale, less necessary operating and marketing expenses, to the person entitled thereto. [R. 150.]

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[3]Prior to 1958, similar provisions were contained in the Sunkist-District Exchange-Association Agreement, to which all agency packing houses were parties. [R. 50-51 and 56.]

[4]The references herein are to the 1958 bylaws. However, prior to 1958, similar marketing provisions were contained in the Sunkist-District Exchange-Association Agreement. [R. 48.] Prior to the 1958 changes, the local associations were not "members" of Sunkist, but a number of individuals, each nominated by a District Exchange, were the members of Sunkist. [R. 96.]

The powers of Sunkist with respect to the marketing of fresh fruit, which is not involved in this lawsuit, are generally similar although they differ in detail. [Bylaws, para. 9.1, 9.2 and 9.4; R. 144-149.] The Bylaws provide that each local association within the Sunkist System shall market all of the fresh fruit it processes through the District Exchange with which it is affiliated, and that each District Exchange shall market all of its fruit through the facilities of Sunkist. [R. 144.] Each of the local associations and District Exchanges designates and appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of fresh fruit. [R. 144.] District Exchanges and local associations within the Sunkist System are specifically prohibited from soliciting business from the trade, or employing any solicitor or agent, or corresponding with any buyer for the purpose of promoting the sale of their fresh fruit. [R. 146.] Sunkist is given the right to pool all transportation costs on an equitable basis for fresh fruit shipped outside the state. [R. 147.]

In short, all growers who agree to market their fruit through packing houses which are members of the Sunkist System are committing themselves to cooperative marketing with other growers marketing through Sunkist, whether the particular packing house they are dealing with is an agency association or a cooperative association. The marketing powers and duties granted to Sunkist apply equally in either case; there is no distinction in the Bylaws between the various types of packing houses.

The fruit of the growers within the Sunkist System is marketed not by the packing houses, but by Sunkist. Where products fruit is involved, Sunkist has the final

authority with respect to all marketing and processing decisions. It has the right to pool the fruit of one packing house with that of another packing house, and to equalize transportaion charges, so that the benefits of the Sunkist processing facilities are available to all growers in the system. Every grower in the system markets on an equal basis, sharing the marketing opportunities with every other grower in the system.

Thus, the growers who market their fruit through the Sunkist system are in fact engaged in cooperative processing and marketing, as authorized by the Capper-Volstead Act, irrespective of the existence of the agency associations.

2. District Exchanges.

Intermediate between Sunkist Growers, Inc., and the packing houses in the Sunkist System are organizations which are called "District Exchanges." The District Exchanges are nonprofit membership corporations composed of the Sunkist packing houses within their particular areas. Their function is set forth in the Stipulation of Facts:

> "Each District Exchange is organized and operated to meet the peculiar local needs of its member packing house associations. In the job of marketing the fruit of its member associations, the District Exchange generally is in communication, through representatives furnished by Sunkist, with customers in the major markets throughout the United States. District Exchange personnel possess specialized sales knowledge applicable to the fruit produced in the area served by the particular District Exchange. They negotiate and

confirm sales for their member packing houses and arrange for the physical shipment of fruit to market." [R. 42.]

3. Packing Houses.

Neither the District Exchanges nor Sunkist has facilities for physically handling fruit. The actual handling of fruit throughout the marketing operation is by the packing house associations or, in the case of products fruit, by one of the products facilities (Exchange Orange or Exchange Lemon). [R. 42.] The function of the packing houses is described in the Stipulation. The packing house association

> ". . . normally sends its specialized crews into the groves to pick the fruit. When fruit is brought to the packing house, it is washed and graded. The fruit graded as products fruit is then diverted to a separate, so-called, juice fruit bin. The remaining marketable fruit is then either packed or put up as loose fruit awaiting sale on the fresh fruit market. When a sale in fresh fruit channels has been arranged, the fruit is shipped to the customer on a delivered price basis, or placed aboard the train or truck in the case of f. o. b. sales, or shipped to the selected auction or public sale markets . . . When the decision was made for any reason to divert fruit to products utilization (as distinguished from sale in fresh fruit channels) the Exchange Lemon or Exchange Orange was notified . . . and their trucks picked up the fruit for transportation to the appropriate processing plant." [Stipulation of Facts, R. 41-42.]

Thus, the functions performed by the packing houses in the Sunkist System (including the agency associations) are a part of the cooperative handling and preparing for market which is specifically authorized by the Capper-Volstead Act. The Sunkist Bylaws provide that:

> "Each Local Association [packing house] shall maintain appropriate agreements between itself and its growers which will provide for the delivery to such Local Association of all the fruit covered by such agreements." [R. 131.]

A typical agreement between an agency association and one of its growers is attached to the Stipulation of Facts as Exhibit B. [R. 70-72.] The agreement provides that on a cost plus fixed fee basis, the packing house will receive, process, grade, pack, and in an orderly manner market the growers' fruit. The agreement also provides that the packing house may pool the growers' fruit. [R. 70-71.] The agency house is the marketing agent for its growers. By reason of the fact that the agency houses which are involved in this lawsuit are members of the Sunkist System, the grower who signs such a contract in effect designates Sunkist as his marketing agent.

The claim of the Petitioner that the relationship between the grower and the agency house is one of simple purchase and sale is incorrect. Although the contract between the grower and the agency house uses some of the language of purchase and sale, the Stipulation of Facts does not.[5] That Stipulation describes the re-

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[5]Where the contract provides that the proceeds of the sale are returned to the grower, the courts uniformally hold that a marketing agency is established, not that a sale has occurred. See Argument, III, C. 4 *infra*.

lationship between the grower and an agency association in the following terms:

> "The packing house facilities of the Agency Associations *are made available* to producers on the basis of the fruit being packed for market at cost plus a fixed fee . . . Such Agency Association *furnishes its facilities and services* on an independent contract basis, wholly unrelated to net returns from the sale of the product handled." [R. 35-36; emphasis added.]

In short, all growers who market their fruit through the Sunkist System are fully engaged in the cooperative marketing and processing of their citrus fruit as growers. To paraphrase the language of the Capper-Volstead Act, those growers are acting together with the other growers in the Sunkist System in the collective processing, preparing for market, handling and marketing their fruit.

B. The Cooperative Marketing Activities of the Sunkist System Are Carried on Solely for the Benefit of Its Growers.

Sunkist Growers, Inc. "is organized and exists as a non-profit cooperative marketing association". [R. 125.] The District Exchanges are cooperative corporations. [R. 39.] The packing houses, however, are of three types. The vast majority (80.12% by number and 82.34% by volume [R. 34]) are cooperative in nature. A small number (4.97% by number, and 4.72% by volume) of the packing houses are owned and operated by individual growers and pack their own fruit. [R. 35.] Some of the packing houses (14.91% by number, and 12.94% by volume) are individually owned, or are private corporations or partnerships. [R. 35.] These packing houses, called "agency asso-

ciations", are the elements of the Sunkist System which are now under challenge by the Petitioner. The Stipulation of Facts provides that:

> "From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Association as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs and deductions or assessments for maintenance of authorized reserves or growers' capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box." [R. 43.]

In that part of the Stipulation which describes the nature of the agency associations, the following undisputed facts are set forth:

> "The packing house facilities of the Agency Association are made available to producers on the basis of the fruit being packed for market at cost plus a fixed fee. **The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing.** Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 35-36; emphasis added.]

Thus, it is abundantly clear that the cooperative marketing activities of the Sunkist System are carried on for the benefit of its growers, as is required by the Capper-Volstead Act.

SUMMARY OF ARGUMENT.

I.

CONGRESSIONAL OBJECTIVES IN THE CAPPER-VOLSTEAD ACT.

By the Capper-Volstead Act Congress wanted to encourage and promote, as well as to authorize greater unity of marketing of agricultural products. Furthermore, the Congressional intent was quite clear. The benefits of such collective marketing must accrue to the farmer.

Congress also made it clear that legal technicalities were not to invalidate the organization used by the farmer; the farmers could act in one or more associations, through one or more marketing agencies and have marketing agencies in common; the corporations could have capital stock or not, and the associations and their members could make the necessary contracts to carry out their purposes; Congress recognized that the cooperatives could continue to do business with existing middlemen, and that non-farmers might become shareholders of cooperative associations.

Congress also made clear what it did not want to accomplish: it did not want non-farmers to participate in the gain involved in collective marketing. The farmer should receive the economic benefits of the operation. In addition, the courts have recognized that Congress did not want the activities of the cooperative to exceed legitimate objectives. These objectives have been defined in the *Maryland and Virginia* and in the *Borden* cases.

II.

ACCOMPLISHMENT OF CONGRESSIONAL OBJECTIVES BY THE SUNKIST SYSTEM.

The Sunkist System is directly engaged in accomplishing those objectives outlined by Congress, within the limitations set by Congress and the courts. The Sunkist System collectively markets oranges grown by producers in California and Arizona; the participation in this organization by agency associations permits growers who are not members of cooperative associations to market their fruit through the Sunkist System and to obtain the same economic benefit which other growers marketing through Sunkist obtain. This redounds to the benefit of all of the other growers in Sunkist as well as the growers using the agency association, and results in greater "unity" of marketing effort as fostered and encouraged by Congress.

Furthermore, the economic benefits of the Sunkist marketing operation are returned to the grower. All growers of the System, including those acting through agency associations, receive all of the economic gain obtained by marketing through the Sunkist System. The agency association does not receive greater or lesser amounts for its services because of marketing through the Sunkist System, but all of such variation in return based upon the effectiveness of the Sunkist System accrues to the account of the individual grower.

As a result, the entire system, including the operation through agency associations, meets the limitations laid down by Congress. There is no participation in the benefits of cooperative marketing by non-growers.

III.

THERE IS NO ABUSE HERE WHICH REQUIRES A REMEDY.

The end result of the Sunkist operation, and its contracts with the agency associations, is a system of cooperative marketing which benefits the grower. The results are exactly what Congress sought to achieve.

The arguments of the petitioner are not persuasive. They do not deal with the economic consequences of the Sunkist System, but deal only with a narrow claimed technical defect in permitting the agency association to be a "member." Contrary to petitioner's assertion, there is no requirement in the Capper-Volstead Act that farmers must not receive the assistance of non-farmers in accomplishing the legitimate objectives of cooperative activity.

Although the agency associations are "members" of the Sunkist System, petitioner has made no showing that such membership has any economic effect upon the association, Sunkist, the growers, or the public generally which is not authorized by the Capper-Volstead Act or which is different from the growers' use of cooperative associations within the Sunkist System.

The agency association is, in fact, the marketing agent for the growers who deal through it, as authorized by the Capper-Volstead Act. In accordance with Congressional intention, the economic benefit of the marketing operation is delivered to the individual grower.

ARGUMENT.

I.

THE CAPPER-VOLSTEAD ACT IS AN EXPRESSION OF THE CONSISTENT AND LONG-STANDING POLICY OF CONGRESS TO FAVOR AND ENCOURAGE GREATER UNITY OF EFFORT BY FARMERS IN MARKETING OF FARM PRODUCTS.

A. A Sustained Legislative History for Three Quarters of a Century Has Declared and Reiterated the Congressional Policy Favoring and Encouraging Cooperative Marketing Organizations for Farm Products.

1. General Agricultural Marketing Acts.

The most succinct statement of the Congressional policy favoring agricultural cooperatives is found in the preamble to the Agricultural Marketing Act, which established the Farm Credit Administration in 1929:

> "It is declared to be the policy of the Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce . . . (3) by encouraging the organization of producers into effective associations of corporations under their own control for *greater unity of effort in marketing* and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies." (12 U.S.C. § 1141; emphasis added.)[6]

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[6]A subsequent statute may of course be considered for the light it throws on congressional intent in passing an earlier statute. *NLRB v. Allis Chalmers Manufacturing Co.*, 388 U.S. 175, 18 L. Ed. 2d 1123, 1130 (1967).

To carry out the same purpose, Congress established the Division of Cooperative Marketing in 1926 (7 U.S.C. § 451 *et seq.*). Specifically, producers collectively marketing their products were authorized to exchange past, present and prospective market information among themselves and with their common agents.

Section 5 of that enactment provided in part as follows:

> "Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, darymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them." 7 U.S.C. § 455.

2. Legislative History of Sherman Act.

In 1890, when the Senate was considering adoption of the Sherman Act, an amendment was offered by Senator Sherman, for Senator George, to exempt certain "combinations between laborers" and "any arrangements, agreements, associations or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their . . . products." (21 Cong. Rec. 2612; Appendix pp. 1-2.) That this amendment was not incorporated in the final

act resulted from a feeling of the author that it was not necessary[7] and assurances by senators in charge of the bill that "the act as written without that language in it meant exactly what was contained in the George Amendment."[8]

3. Farmer-Labor Exemption in Appropriation Acts 1914-1927.

Notwithstanding the belief of the authors of the Sherman Act as to its inapplicability to farmers' cooperatives and labor unions, there developed a series of prosecutions and threatened prosecutions of such organizations under both federal and state antitrust laws. By way of interim remedy for this problem, the Congress annually inserted a provision in the applicable appropriations bill designating the amount authorized to be spent by the Justice Department on antitrust enforcement and attaching thereto a proviso prohibiting the Department of Justice from expending funds "for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort and for the purpose to obtain and maintain a fair and reasonable price for their products."[9] This practice extended from 1914 until 1927, out of an abun-

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[7]21 Cong. Rec. 2611.

[8]51 Cong. Rec. 9171, 9540; Appendix pp. 3-4; Sunkist has attached hereto as an appendix, excerpts from the legislative history of various statutes concerning cooperative marketing.

[9]38 Stat. 609, 652, Aug. 1, 1914; 38 Stat. 822, 866, April 3, 1915; 39 Stat. 262, 312, July 1, 1916; 40 Stat. 105, 155, June 12, 1917; 40 Stat. 634, 681, July 1, 1918; 41 Stat. 163, 208, July 19, 1919; 41 Stat. 327, 336, Nov. 4, 1919; 41 Stat. 874, 922, ch. 235, June 5, 1920; 41 Stat. 1367, 1411, ch. 161, March 4, 1921; 42 Stat. 599, 613, ch. 204, June 1, 1922; 42 Stat. 1068, 1080, ch. 21, Jan. 3, 1923; 43 Stat. 205, 217, ch. 204, May 28, 1924; 43 Stat. 1014, 1027, ch. 364, Feb. 27, 1925; 44 Stat. 330, 343, ch. 195, April 29, 1926; and 44 Stat. 1178, 1194, Feb. 24, 1927.

dance of caution, even after adoption of the Clayton and Capper-Volstead Acts.[10]

4. Clayton Act, Section 6 (15 U.S.C. §17).

In 1914, at the particular urging of the American Federation of Labor, Section 6 was added to the Clayton Act. That section provides:

> "Section 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to prohibit the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Although the language of Section 6 was in some degree a delayed enactment of the George Amendment of 1890, it was only partially effective in that it failed to account for the substantial number of farmers' cooperative marketing associations which had been organized as

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[10]Mr. Johnson of Kentucky:

"I appreciate that Congress but recently passed an act relative to farmers. That act yet has to run the gauntlet of the courts; and, until it has done so, and until the act recently passed by the Kentucky Legislature, which enables the farmers to pool their products until they can get a fair price for them has been held good, this language ought to be carried as law in order to prevent prosecution of just such organizations as the one to which I have referred to in Kentucky, and which, I understand, exist in other States." (62 Cong. Rec. 5211 (1922).)

stock corporations because of the need for capitalization to obtain the necessary facilities to prepare for market and market their members' products.

The fact that the language lumped the organizational aspects of labor and farming organizations together apparently accounts for the limitation. A minority report, concurred in by Mr. Volstead, agreed with the established liberal policy of the Congress with regard to farmer cooperatives, but noted that

> "this section is likely to bring down upon them the Sherman Act with all its penalties. When legislation is enacted specifically exempting certain classes of organizations, district attorneys and courts are likely to construe the antitrust laws as rendering unlawful the activities of the classes of organizations not exempted." (House Report No. 627, Part 3, May 13, 1914.)

The minority report was prophetic. The prosecutions, investigations and threats of prosecution which followed made urgent the Congressional clarification and restatement of its policy in the Capper-Volstead Act.

B. The Fundamental Purpose of the Capper-Volstead Act Was to Benefit Farmers by Liberal Authorization of Marketing Cooperatives.

1. Background of Capper-Volstead Act.

The first attempt at legislative relief came with the introduction of the Hersman and Barbour bills in the House of Representatives in 1919. Hearings were had before the Judiciary Committee but no action was taken in Congress. These bills were essentially simple amendments of Section 6 of the Clayton Act to authorize the payment of dividends on stock or membership capital.

Referring to Section 6 of the Clayton Act, Mr. Hersman stated, "The Congress tried to help the farmer solve this problem, but they inadvertently used these words 'not having capital stock.'" He then alluded to the riders on the appropriations bills by stating "you have done everything that you could, when you found that your laws were inadequate to protect the farmers of this Nation, by giving these temporary laws, in the hope that he would not suffer. Now we are coming before you to ask you to clarify the situation of the farmer, so that he will know definitely where he is; so it will not be necessary to write on every bill a rider in order to give proper protection to farm organizations."[11]

It was clear from the intitial testimony of Messrs. Hersman and Barbour that the impetus behind the proposed legislation was activity such as the pending Federal Trade Commission investigation of the California Associated Raisin Co. Congressman Barbour reported that

> ". . . this is the second time—next month will be the second time within about six weeks that they [the Raisin Growers] have been brought over here to show cause why they should not be indicted. It is getting to be a pretty serious proposition with us." (House Hearings, H.R. 7783, page 9.)

Following this testimony, John D. Miller, on behalf of the National Board of Farm Organizations gave extensive testimony emphasizing additional pending prosecu-

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[11]Hearing of House Judiciary Committee on H.R. 7783, Oct. 1919, entitled "Collective Bargaining for Farmers," pages 5 and 6.

tions or threats of prosecution of farmer cooperatives under the antitrust laws. (House Hearings, H.R. 7783, page 19).

Another witness described pending investigations by the Department of Justice in the Philadelphia area. (House Hearings, H.R. 7783, page 94.) Further testimony covered antitrust litigation involving potato growers in Caribou, Maine. These investigations and prosecutions stimulated the consideration of the Capper-Volstead Act.

2. The Express Purpose of Congress Was to Authorize Wide Diversity of Form for Cooperatives.

The committee hearings and the debates in the House of Representatives and Senate indicate that the Congress had a rather full comprehension of the great variety of organizational forms which farmer cooperatives had taken throughout the United States. The discussion at no point indicated an intent to invalidate any of the organizations known to the Congress at that time, and in fact the contrary was clearly expressed in the House Committee Report.

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this bill. The bill does not, however, compel any association to change its present organization nor does it create any new organization." H.R. Rep. No. 24, 67th Cong., 2d Sess. (1921).

What were some of the organizational forms of the cooperatives which were brought to the attention of the Congress? The hearing reports show the ex-

amination of many different cooperatives. Among others the raisin cooperative and Sunkist were discussed. These two are discussed below.

(a) *California Associated Raisin Company.* The California raisin growers had acquired control of approximately 70-90% of the raisins grown in the United States in 1922. Their association, California Associated Raisin Co., had been invesitigated thoroughly by the Federal Trade Commission. The F.T.C. concluded that in order to qualify under Section 6 of the Clayton Act, the association would have to make certain changes:

> (a) Eliminate capital stock, and substitute therefor a nonprofit sharing basis of providing financial resources. (In fact, approximately one-third of the capital stock of the raisin growers had been held by nonproducers, that is, by bankers and businessmen in the community.)
>
> (b) Eliminate profit to the corporation or its stockholders as profit on the operations of the corporation. (Under its bylaws, the association paid 8% as maximum return on capital stock. "Any profit remaining after setting aside a sum of money equal to 8% on capital stock, is distributed back annually to the sellers of raisin grapes on a pro rata basis proportionate to the tonnage delivered to the corporation by each individual grower.")
>
> (c) Membership or beneficial interest in the corporation would have to be restricted to actual growers of raisin grapes."[12]

The detail of the organization and operation of the raisin association was expounded at length by the at-

[12]F.T.C. Letter included in Senate Hearing, Appendix pp. 5-8.

torney for the remaining independent handlers in the industry, who had been fostering the F.T.C. investigation (Appendix pp. 9-10), by the attorney for the association (Appendix pp. 10-11) and by the president of the association (Appendix pp. 11-12).

Senator Walsh, who was one of the members of the subcommittee which held these hearings, subsequently made repeated references on the floor of the Senate to the California raisin association. Thus, after referring to the capital requirments of the raisin growers and the solution which they had used, he declared "it is such an organization as that that is contemplated here."[13]

In this regard, Senator Walsh noted that

> "under Section 6 of the Clayton Act an association can be protected only when it has a membership without capital stock; and it was intended to extend this to associations that have capital stock, but that did not pay more than 8% on that capital stock, the remainder of the avails to be divided exactly as the avails are divided among the associations organized under Section 6 of the Clayton Act." (60 Cong. Rec. 365.)

It is perhaps worthy of note that Senator Walsh's expression that it was the intent of Congress to cover organizations such as the raisin growers appears to have been confirmed by the fact that the Capper-Volstead Act specifically cured each of the three deficiencies in Section 6 of the Clayton Act as noted by the F.T.C. Thus, capital stock corporations are included, divi-

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[13]60 Cong. Rec. 365. (Appendix pp. 12-13.)

dends up to 8% are authorized, and beneficial interest in the association is satisfied if it is operated for the benefit of its members as producers.

(b) *Sunkist System.* The Sunkist System received more than casual attention in the Congressional debates (Appendix pp. 15-21). It was repeatedly cited in the Congressional debates as an example of sound co-operative marketing.

Senator Walsh, in 1922, stated:

> "I had occasion some years ago to make a very careful and exhaustive examination into the organization of the California Fruit Growers Associtation [Sunkist]. I am satisfied that it has made fruit growing a great and profitable industry, when it was of doubtful success, and I am confident that upon the whole, the people of the United States have paid less for citrus fruit than they would have paid if the products were not put upon the market by the present organization which it represents." (62 Cong. Rec. 2121.)

It is stipulated in this case that "by 1920, the corporate and functional pattern of the Sunkist System was established as it remained until October 31, 1958 [when the products companies were merged into Sunkist Growers, Inc.]." [R. 41.]

3. Congress Expressly Intended to Benefit the Farmer.

At the time that the Capper-Volstead Act was passed, the agricultural sector of our economy was suffering from a severe depression. Senator Walsh stated:

> ". . . it may doubtless be said, unfortunately, that perhaps there never was a time in the history of this country when this great, basic industry was

> suffering from such intense depression as prevails at the present time. . . . Anything which could be proposed to alleviate the present condition, characterized by the depression of which I have spoken, or which would tend to promote the welfare of the farming industry generally, even under normal conditions, ought to have the earnest consideration of members of this body, and it certainly has my sympathy." (62 Cong. Rec. 2121.)

Senator Capper was equally explicit:

> "The situation today is critical. It is dangerous. American agriculture has never reached so low an ebb as it has today." (62 Cong. Rec. 2059.)

Congress enacted the Capper-Volstead Act to benefit the farmer. The report of the House Committee on the Judiciary provided in part:

> "Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but actual farmers and all associations not operated for the mutual help of their members as such producers." (House Report No. 24, 67th Congress, 1st Session.)

In the debates on the prior bill, H.R. 13931,[14] Congressman Morgan had stated its purpose in these words:

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[14]In 1920, Mr. Volstead had introduced a bill which included the substance of the Capper-Volstead Act. It passed both the House and Senate, but the Senate added a prohibition against the acquisition of a monopoly. The Conference Committee was unable to agree and the bill died. In the 1922 debates, an amendment was again offered in the Senate prohibiting the acquisition of a monopoly. Senator Norris (and others) argued that one of the purposes of the bill was to permit a monopoly. (62 Cong. Rec. 2269.) This time the Senate defeated the proposed amendment by vote of 68 to 17, counting 24 paired votes. (62 Cong. Rec. 2281.)

"The object of the bill under consideration is to make it clear that persons engaging in the production of agricultural products may form corporations or associations, either with or without capital stock, and may engage in collectively marketing their products. In other words, Congress desires to encourage farmers in forming cooperative business organizations and to use such organizations as a means of promoting agricultural prosperity and adding to the profits of the business of farming. (59 Cong. Rec. 7851.)

"The national government should not only permit farmers' cooperative organizations, but should encourage them by both legislation and appropriations. Above all, there should be no uncertainty as to what the law is on the subject. I believe now, as I believed six years ago, that through cooperative business organizations farmers will get better prices for their products and pay less for the supplies they purchase and thus add largely to their net profits. . . . The excessive charges of unnecessary middlemen will be eliminated. . . . The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. . . .

"[F]armers will be more prosperous, the cost of living will be reduced, and the general public welfare will be benefited." (59 Cong. Rec. 7852.)

Debate on the Capper-Volstead Act was opened in the Senate by Senator Kellogg; the objective was to benefit farmers:

"The main object of the cooperative association is to get reasonable prices for the farmer, prin-

cipally through lessening the cost of marketing and selling his products and cutting down the difference between what the farmer receives and what the public finally pays. That is the main object." (62 Cong. Rec. 2049.)

Senator Capper had the same view:

"Cooperation will give farm products to the consumer cheaper and at the same time yield larger returns to the man who produces by eliminating much of the excessive cost of distribution under the present system in which speculation plays so dominant a part. Furthermore, participation by farmers in the marketing of farm products through cooperative associations, giving them the right to bargain collectively with buyers, will result in stabilizing the market, preventing waste, and, as I have said, bringing about more efficient distribution . . . Today there is no legislation the enactment of which would accomplish greater good for this nation." (62 Cong. Rec. 2059.)

C. Congress Desired to Limit the Benefits of Cooperative Marketing to Farmers.

The speculative middleman was the object of Congressional ire.[15] Farm prices were depressed and consumer prices were inflated. "A farmer sells a bushel of wheat and is paid for a peck; the consumer buys a peck and pays for a bushel."[16]

Senator Capper said:

"The producer of food under the present system is compelled to see his products go on the market

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[15]See, *e.g.*, the statement of Senator Kellogg, *infra*, at p. 45.

[16]62 Cong. Rec. 2060 (Mr. Volstead.)

subject to the whims of speculators and gamblers. He knows from long experience that to function the speculator buys as low as he can force prices down, buys to the extent of his resources or the resources banks will lend him, and exerts a powerful control over the food supply of the nation between the time it leaves the hand of the producer until it reaches the consumer, at greatly inflated prices, utterly unjustified by the actual cost of their physical distribution. From the other side, the consumer sees the farmer receiving low prices for his products. . . . But he never buys them on the basis of what the farmer receives. In between, in addition to the reasonable compensation he is willing that the man who actually handles the products should receive, there is a wide margin representing the rake-off of the speculative middlemen.

"Mr. President, this annual tribute, gouged from the pockets of citizens already struggling with the problems of living and squeezed from commodities necessary to their existence is a national outrage—an evil that demands correction and it must be corrected." (62 Cong. Rec. 2059.)

It was of prime importance that the consumer not be charged unreasonable prices.[17] But it was equally important that farm products bring a return to the farmer roughly equal to the return produced by other business activities.

"The best way, the only feasible way, to bring this parity about, it seems to me, is to increase the

[17]The vast bulk of the argument in Congress related to the most effective means of implementing Section 2 of the Act, which is not in issue in this case.

producer's profit by shortening the road to market. The way to accomplish this is through cooperative marketing, which eliminates the unessential and speculative middleman, and which gives the producer and consumer their due."[18]

Precisely what Mr. Volstead meant by the foregoing general statement was demonstrated by the experience of the Sunkist System as he recited it:

"As a result of intelligent cooperative marketing the 11,000 members of a California citrus fruit-growing organization distribute $75,000,000 worth of their products annually to jobbers at a cost of less than 1½ per cent. It costs the individual grower from 7 to 10 per cent to do the same thing. Here is a saving of from 5½ to 8½ per cent, due to cooperation in the handling of one of the most expensive crops put on the market.

"There are already hundreds of small farm cooperative enterprises in every strongly agricultural State. They only need to be linked up to a cooperative marketing system to become a great blessing to the American people and to American agriculture." (62 Cong. Rec. 2061.)

Congress did not, however, go beyond limiting the benefits to the producers. It authorized marketing agents in common and contractual arrangements with non-producers; it authorized great flexibility of form; and it did not prohibit non-producer activity so long as the association was operated for the benefit of the producers.

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[18]62 Cong. Rec. 2060. (Mr. Volstead.)

D. Congress Did Not Place Limitations on the Kind of Organization a Cooperative Could Use.

1. Congress Intended to Authorize Any Kind of Organization Which Sought the Objectives of the Act in Good Faith.

The House Committee Report on the bill declared:

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this bill. The bill does not, however, compel any association to change its present organization nor does it create any new organizations": H.R. Rep. No. 24, 67th Cong., 2d Sess. (1921).

This is in accordance with the language of the Act, which authorized farmers to use associations of any type: such associations might be "corporate or otherwise, with or without capital stock." The basic requirement is that the associations must be operated "for the benefit of the members thereof, as such producers."

Senator Capper argued in support of the house bill, and against the substitute proposed by the Senate Committee on the Judiciary, and stated:

> "The original bill—(a) authorizes and validates cooperative associations of producers *regardless of technical form, limited only by certain test requirements as to cooperative character.*
>
> "(b) permits them to develop their activities to a natural extent, which involves a tendency toward great commodity organization.

"(c) safeguards the public against any possible abuse by such cooperative marketing associations by appeal to and action by the Department of Agriculture." (62 Cong. Rec. 2057-2058; emphasis added.)

2. Congress Expected That Persons Who Were Non-Producers Would Become Shareholders of Cooperative Organizations.

One of the basic weaknesses of Section 6 of the Clayton Act had been that it did not provide a ready solution to raising the capital needed for harvesting, packing, processing and marketing the farmers' products. The requirement of nonprofit mutual operation assured compliance with the basic cooperative tenet of returning the maximum possible economic benefit to the producer.

The Congress recognized the problem of obtaining capital in the drafting of the Capper-Volstead Act. Two basic alternatives were made available:

(1) *Capital Stock* could be issued or other capital contribution obtained and dividends not exceeding 8% paid thereon. This involved adapting the law to the existing practice of the California raisin growers (Appendix pp. 7-8) and the Wisconsin cooperative statute.[19] By limiting the dividend to a

[19]Hearings on H.R. 2373, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 1st Sess., at p. 176; testimony of Chas. Holman. The Wisconsin cooperative "is created for service to members and not for profit to the corporation." To that end there is a limitation of dividends on capital stock, but it is recognized that in some types of cooperative organization it is necessary for farmers to have some capital stock. The Wisconsin law limits the dividends to 8% at the present time.

fixed amount, the grower is assured that the bulk of the proceeds and all of the benefit of the combined marketing power will be returned to him.

(2) *Necessary contracts* may be used to carry out the purposes of the cooperative. Thus, in the 1890's, Sunkist associations "arranged to have their fruit packed by [commercial] packers under contract." [R. 38.] So today, and in the period since 1920, those growers who market their fruit through agency associations have elected to utilize an agency contract to resolve their need for capital.

Such a grower is not burdened, as is the grower affiliated with a cooperative association, with "deductions or assessments for maintenance of authorized reserves or grower capital." [R. 43.] In lieu thereof, he pays in addition to the actual costs of packing a fixed fee per carton of fruit packed.

The limitations on dividends and voting rights were inserted to prevent non-growers from gaining control of a cooperative or from abusing control if they should gain it. At one point in the debates, Senator Promerene proposed an amendment that would require cooperative associations to conform to both the restriction on voting and the restriction on dividends. Senator Walsh, in arguing against this amendment, pointed out that certain of the cooperatives required capital for their operations, and for this reason they organized with capital stock:

> "It is recognized that in order to carry on the business of any of these cooperative associations they must have capital. Frequently the farmers themselves are unable to provide the capital.

So they go to a bank or to a merchant or to someone else who has money, and the banker or the merchant agrees to advance the necessary capital. *He thus becomes a stockholder* in the corporation where he can have no more than eight percent profit or return on his stock. . . .

[The] second clause is intended to permit them to go out and secure capital, but the profits which the *mere stockholder* gets are limited to 8 percent." (62 Cong. Rec. 2271-2272; Emphasis added.)

Senator Norris gave a similar explanation:

"It was not desired to make it necessary by the passage of this measure for any State to enact additional legislation; but where such a condition did exist we desired to prevent any idea of a monopoly or anything of that kind by allowing anyone to become a member of an organization and, then to control it under an arrangement by which he could have as many votes as he could buy shares of stock. Under such an arrangement some outsider, like Armour or any other big packer or Barnes or any big grain elevator man, could come in and buy a controlling interest in some small association and outvote the other members. That might happen if the conditions imposed in the first clause were not provided. To prevent that from happening and these cooperative associations being thus used for evil purposes we provided that they should in such cases never have a dividend of more than 8 percent. Do not the Senators see the object of that clause?" (22 Cong. Rec. 2273.)

Congress thus intended that non-growers could participate in a Capper-Volstead cooperative.

3. Congress Was Aware of the Fact That Cooperatives Would Continue to Do Business With Existing Middlemen.

Although Congress authorized farmers and fruit growers to establish vertically integrated cooperatives, from handling and processing to preparing for market and marketing of their product, farmers were not required to engage in all those activities. Fruit growers could thus use existing processing or marketing facilities where they desired. Senator Kellogg in opening the debate in the Senate, noted this. He pointed out that the marketing of a large crop was a difficult job:

> "This requires study, experience, and cooperation among the farmers. I do not say that the farmers are going to set up all their local stores and sell at retail everything. They will use, as they have in the great California Fruit Growers Associations, the marketing facilities already established; but they have their agents who understand the market, know where to ship, when to ship, and what kind of fruit to ship, and they guarantee quality and quantity; and today the buyer who buys a box of oranges or a barrel of potatotes knows what he is going to get." (62 Cong. Rec. 2052.)

II.

THE SUNKIST SYSTEM ACCOMPLISHES THE PURPOSES OF THE CAPPER-VOLSTEAD ACT WITHIN THE LIMITATIONS LAID DOWN BY CONGRESS AND THE COURTS.

A. The Sunkist System Constitutes a Single Association of Fruit Growers Within the Meaning of the Capper-Volstead Act.

Measured by the applicable substantive economic tests, the Sunkist System is an association of fruit growers operating in full compliance with Section 1 of the Capper-Volstead Act. It has known a broad diversity of organizational forms in the period since the 1890's, when its growers began to organize. There have been stock corporations [R. 39], and membership associations [R. 36]. There have been subsidiaries [R. 40-41] and direct ownership of facilities [R. 38]. There has been contract utilization of packing house facilities [R. 38] and grower ownership of those facilities [R. 38]. But in economic substance, the system has always been one federated association within the meaning of the Capper-Volstead Act.

This is perhaps best illustrated by this Court's opinion in the *Winckler & Smith* case:

> "[w]e feel that the 12,000 growers here involved are in practical effect and in contemplation of the statute one 'organization' or 'association' even though they formally organize themselves into . . . [separate legal entities] . . . That the packing is done by local association, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from

being considered one organization or association for the purposes of the Clayton and Capper-Volstead Acts." (*Sunkist Growers, Inc. v. Winckler & Smith Co.*, 370 U.S. 19, 29 (1962).)

B. The Primary Objective of the Sunkist System Is the Cooperative Marketing of the Products of the Growers Who Receive the Benefits of the Sunkist System.

The aim and object of the Sunkist System is the orderly collective marketing of the oranges of those growers who receive the benefits of the Sunkist System.

The bylaws in effect at the time the present litigation was commenced provide as follows:

> "The general purpose for which the Exchange [Sunkist] is instituted is to furnish the facilities and agencies through which the citrus fruits and their by-products of its members and growers represented by them may be marketed and distributed upon a uniform plan and in such manner as to bring about a standard of quality, a more uniform distribution and larger consumption thereof in the markets of the United States and in other places." [R. 95.]

The amended Articles of Incorporation of Sunkist, adopted in 1958 following the merger of Sunkist, Exchange Orange Products Co. and Exchange Lemon Products Co., contains the following paragraph regarding the purpose of the corporation:

> "The primary purpose for which Sunkist is formed is to furnish facilities and agencies through which citrus fruits of its members and

other producers may be marketed or processed and marketed, and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses, on the basis of the quality or value of citrus fruits marketed for such member or other producer." [R. 124.]

By the typical contract between a Sunkist grower and an agency association [Ex. B to Stipulation, R. 70] the grower agrees to deliver its fruit to the agency association, and the agency association agrees to receive, process, grade, pack and in an orderly manner, sell said fruit.

The association, in turn, appoints Sunkist as the marketing agent for the growers. Section 9.2 of the amended bylaws [R. 144] provides in part as follows:

"*Marketing agency created*—Each Local Association and District Exchange designates and appoints Sunkist as its agent and the agent of its growers in all matters concerning the marketing of its fresh fruit, and the processing and marketing of its products fruit."

All of the fruit which comes into the Sunkist System is marketed by Sunkist, as a cooperative marketing activity, for the benefit of the growers who produced that fruit. Each of the growers whose fruit comes into the system, whether as a corporate grower, through a cooperative association, or through an agency association, has its fruit marketed by Sunkist in the same manner.

C. The Benefits of the Sunkist Operation Are Returned Directly to the Grower Who Produced the Oranges.

As the amended Articles of Incorporation of Sunkist Growers, Inc. point out, the function of Sunkist is to market the fruit, "and to return to said members or other producers the proceeds of sales, less necessary operating and marketing expenses. . . ." [R. 124.]

The net proceeds of sale after deduction of expenses of marketing by Sunkist are returned to the association which originally received the fruit. The association in turn distributes the proceeds of sale to the grower who produced the fruit, less certain deductions.

As the stipulation between the parties points out,

> "From an accounting standpoint, all members of the Sunkist System beyond the grower (with the exception of the Agency Associations as hereafter noted) operate on a strict cost basis, remitting to the grower, through the channels of the System, all marketing proceeds in excess of reimbursement of actual costs, and deductions or assessments for maintenance of authorized reserves or grower capital. The Agency Associations return to their growers all of the proceeds of marketing over their actual cost plus the fixed fee per box." [R. 43.]

In each case, therefore, the grower receives all of the benefit of the Sunkist marketing system. If the oranges are sold at a better price because of Sunkist's operations, the grower receives one hundred precent of that increase in price. If, on the other hand, the market falls and the fruit is sold at a lesser price, the grower who produced the fruit must bear all of the loss of the de-

crease in price. Therefore, in accordance with the basic intention of Congress, the benefits of the cooperative marketing system are returned directly to the grower who produced the fruit. The rule is uniform throughout the Sunkist operation, and in every case the proceeds of the sale of the fruit are ultimately returned to the individual grower who produced the oranges.

D. The Limitations Laid Down by Congress and by the Courts Have Been Complied With by Sunkist.

1. Non-Growers Do Not Receive Any of the Benefits of Collective Marketing by Sunkist.

Not only does the grower receive the benefits of the Sunkist operation, or the "avails" as Senator Walsh denominated them (60 Cong. Rec. 365), but no one other than the grower participates therein. It is conceded that such is the case with respect to the cooperative associations and the corporate growers. (Pet'n. Br. 5.) So far as the agency association is concerned, the Stipulation makes this fact crystal clear:

> *"The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and a fixed fee for packing.* Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 36; emphasis added.]

Furthermore, it is clear that the agency associations do not, in fact, receive anything from the Sunkist operation. It is true that the agency association recovers its costs plus a fixed fee for its services. However, such

payment is received specifically because of its contract with an individual grower, and does not represent a distribution by Sunkist to the agency association on account of any contribution the agency association has made to the Sunkist System, or on account of any profits which the Sunkist System has made. The funds which are delivered by Sunkist to the agency association are the proceeds of sale, and they are given to the agency association as agent and trustee for the grower whose fruit has been marketed by Sunkist.

2. Sunkist Does Not Market Non-Member Fruit in Appreciable Quantities.

The Stipulation between the parties does not specifically provide that any fruit is marketed through the Sunkist System as non-member fruit. It does show that, if any non-member fruit is marketed, it is a very small amount, and does not begin to approach the 50% authorization of the Act. [R. 34-35.] It also shows that no one is permitted to buy fruit produced by others and market it through the Sunkist System and thereby obtain the benefits of collective marketing. [R. 34 and 35.]

In each case Sunkist returns the benefits to the individual who produced the oranges. (As used in the Capper-Volstead Act, we believe the word "members" means those persons who receive the economic benefits of collective marketing, not those who are "members" in the corporate sense. See *Sunkist Growers Inc. v. Winckler & Smith Co.*, 370 U.S. 19 (1962). However, that issue is not material at this point because, by any test, the amount of non-member fruit is negligible.)

E. The Capper-Volstead Act Should Be Liberally Construed.

The Congressional history of the Capper-Volstead Act shows that Congress intended that the Act should be liberally construed. The House Committee report on the bill stated that,

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of their members might avail themselves of the provisions of this bill." H.R. Rep. No. 24, 67th Cong., 2d Sess. (1921).

The courts have recognized that similar Acts should be liberally construed. In *Interstate Commerce Commission v. Jamestown Farm, U.F. Co-op. T.A.*, 151 F. 2d 403, 404 (8th Cir., 1945) the Court discussed the Agricultural Marketing Act, 12 U.S.C. 1141 and stated, "But whether the interstate operator of such a truck is in an activity in which the farmers' cooperative is or is not permitted to engage presents a questions arising under the Agricultural Marketing Act, a remedial statute, entitled to liberal construction to effectuate the purpose for which it was adopted."

The definition of a cooperative association under the Agricultural Marketing Act is substantially identical to that in the Capper-Volstead Act.

The Court reached the same conclusion in *Northwest Agricultural Cooperative Association v. Interstate Commerce Commission*, 350 F. 2d 252 (9th Cir., 1965), when it declared at page 257:

> "The meaning which we ascribe to the term 'cooperative association' accords with the general purpose of the Agricultural Marketing Act. The

Act was intended to encourage the organization and operation of farm cooperatives; its terms are to be liberally construed to effectuate that purpose."

Where, as here, the primary aim of the operation is to market cooperatively the products of the producers involved, and where the benefits of that operation are returned to the producer and not to non-producers, the System has carried out the basic program which Congress wished to encourage, and has stayed within the limitations which Congress laid down. The addition of other limitations to the marketing system which were not contemplated by Congress, and which are not stated in the Capper-Volstead Act would be contrary to the original understanding and intention of Congress in passing the Capper-Volstead Act.

III.

THERE IS NO ABUSE INVOLVED IN THE PRESENT CASE, NOR ANY SITUATION WHICH REQUIRES A REMEDY.

A. The Capper-Volstead Act Does Not Prohibit the Farmer From Obtaining Assistance of Non-Farmers.

The primary position of Petitioner seems to be that the Capper-Volstead Act provides that "farmers" or "fruit growers" may act together in associations. Petitioner immediately concludes that it must follow that non-farmers may not assist in any way.

There is no support for Petitioner's position. No language in the Act prohibits farmers from obtaining whatever assistance they may need in order to carry out these functions from non-farmers. Quite to the con-

trary, the Act itself specifically mentions three areas where participation by non-farmers is contemplated:

(1) The Act permits the associations to have "marketing agencies in common." It is therefore intended that the associations may acquire marketing agencies, and that independent associations can contract with the same marketing agency.

(2) The "associations and their members may make the necessary contract and agreements to effect such purposes." If the associations and their members desire, therefore, to have outsiders assist them in this work, they may make the necessary contracts to do so without violating the antitrust statutes.

This Court described the limits of such contracts in *Maryland and Virginia Milk Producers Ass'n, Inc. v. United States,* 362 U.S. 458, 465 (1960), as those which sought the "legitimate objects" of cooperative activity. As the majority opinion below so clearly pointed out, the activities of the agency associations are legitimate and appropriate cooperative functions (369 F.2d at 462).

(3) The Act expressly recognizes that the associations may be organized into corporations which have stockholders, and, as the Congressional history reviewed above points out, Congress contemplated that those stockholders need not be growers. It did not place any limitation in the statute regarding stock ownership.

Occasionally, in Congressional debate, a speaker shows an uncanny clairvoyance on a particular situation which might arise in the future. Senator Kellogg considered *Sunkist's* use of existing marketing facilities!

In opening the debate on the Capper-Volstead Act in the Senate, Senator Kellogg prophesied:

> "I do not say that the farmers are going to set up all their local stores and sell everything at retail. They will use, as they have in the great California Fruit Growers Associations, the marketing facilities already established. . . ." 62 Cong. Rec. 2052.

Congress expected farmers and specifically Sunkist to use other marketing facilities.

Therefore, not only is there no exclusion of non-farmer assistance in the Capper-Volstead Act but the Act itself, and Congress, clearly contemplated that non-farmers would be involved.

B. Even the Legislative History Cited by Petitioner Shows That the Primary Test of Capper-Volstead Qualification Is Whether or Not the Economic Benefits Are Passed on to the Growers.

The legislative history cited by the Petitioner simply confirms what has been stated before: Congress wanted the economic benefit of cooperative marketing to go to the grower, and desired to encourage cooperative marketing so that the farmers of the country would be able to achieve bargaining equality with other businesses and industries, increase the efficiency of their operations, and increase their net return.

The passages relied on by the petitioner do not assert that the services of non-growers may not be used; indeed, they do not say that non-growers may not be "members"! Only two of the passages cited by the Petitioner deal directly with the question of whether or

not non-growers may receive the benefits of collective marketing, and these passages do not even discuss the question of "membership."

In the Kellogg-Cummins-Townsend exchange (62 Cong. Rec. 2052; Pet'n Br. 9-10), Senator Kellogg pointed out that the "privileges which the bill grants" are intended for the benefit of the "farmers, people who produce farm products of all kinds", and were not intended for the middlemen.

House Report No. 24, 67th Congress, First Session (Pet'n Br. 13), contains a similar passage:

> "Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but actual farmers and all associations not operated for the mutual help of their members as such producers."

Neither in the statute nor in the legislature history was Congress concerned with who was designated as a "member." In fact they show that Congress expected participation and assistance by non-growers, and even that "members" might have other interests. But the Act provides that the association shall be operated for the benefits of its members "as such producers." Sunkist does exactly that.

In other words, there are four principles which are consistent with all of the legislative history:

(a) The economic benefits of collective marketing should be returned to the producer.

(b) Those economic benefits should not be given to non-producers.

(c) The associations may contract with non-producers to carry out legitimate cooperative activities.

(d) There is no prohibition against having non-farmers as "members" in the corporate sense.

Direct comparison of the legislative history relied upon by the Petitioner, and the stipulated facts in this case affords the clearest kind of proof that the Sunkist System meets the requirements laid down in the legislation.

As shown by the Stipulation and Exhibit B attached thereto, the proceeds of sale of the fruit, that is the "benefits" of collective marketing, are returned directly to the grower who produced the fruit. Therefore, the "benefits of the legislation" go to the "actual farmers" and to no one else.

C. The Fact That Agency Associations Are Designated as "Members" Does Not Affect the Qualification of Sunkist Under the Capper-Volstead Act.

1. "Membership" of Agency Associations Has No Economic Significance.

Petitioner urges that the fact that agency associations are "members" causes the loss of the Capper-Volstead qualification. The only reason suggested is that such membership permits the agency associations to enjoy the benefits of collective marketing.

The facts show otherwise. The benefits of collective marketing are returned to the grower, not to agency associations.

Petitioner has failed to show any significance, *economic* or *otherwise,* to such membership. "Membership" is simply a contract between Sunkist and the

agency association. It is the technique by which the association carries out its duty to the grower in marketing his fruit.

Furthermore, we believe that for the purposes of the Capper-Volstead Act the "members" are the persons who receive the economic benefit of collective marketing. Practically speaking, the growers are the "members" of Sunkist. We often so refer to them. For example, this Court was familiar with the federated Sunkist structure in the *Winckler* case, and observed that there had been several references to Sunkist in the Congressional debates on Capper-Volstead, and that Sunkist was "then called California Fruit Growers Exchange and numbering 11,000 members. . . ."

Sunkist Growers v. Winckler & Smith, 370 U.S. 19, 28 (1962).

In that case, this Court also declared that the basic test was one of economic significance of the facts under consideration. The Court said,

> "There is no indication that the use of separate corporations had economic significance. . . .". (370 U.S. at 29.).

Here there is not even an argument that the "membership" of the agency association had economic significance. The facts show it did not.

2. The Use of Packing Houses in the Sunkist Structure Is a Practical and Reasonable Organizational Device.

The problem of organizing ten or eleven thousand citrus growers for purposes of marketing their fruit has many complexities. For efficiency, the organization must be broken down by functions or by geography so that all appropriate services can be per-

formed for each individual grower. The packing house is the obvious beginning point, because each grower must have his fruit brought to a packing house for purposes of washing, sorting, grading and packing, and as a central place from which shipment may be made.

3. The Agency Association Serves the Same Economic and Cooperative Purpose for Its Growers as the Cooperative Association Does for Its Growers.

As the Stipulation shows, about eighty percent of the fruit marketed by Sunkist comes into the Sunkist System from cooperative associations which own their own packing houses. Such cooperative associations are "members" of the Sunkist System, although they, *per se,* are not fruit growers. Petitioner directly concedes that having such cooperative associations as "members" is perfectly appropriate, and was, in fact, approved in *Sunkist Growers Inc. v. Winckler and Smith Citrus Products Co.,* 370 U.S. 19 (1962) (Pet'n. Br. 5).

Membership certificates are not issued to any "growers", yet the entire Sunkist organization is aimed solely at benefiting the grower. In each case the packing house is treated as the "member" representing its growers. What, then is the significant difference between using a cooperative association and an agency association as the organizational unit for growers whose fruit is marketed through that packing house?

The only effective economic difference between the use of a cooperative association and the use of an agency association is that the grower or growers who do not wish to put up the initial capital to create and maintain a plant for processing oranges for delivery

may contract with an agency association to supply that service and those facilities, and to act as marketing agent through Sunkist.

If a farmer doesn't have the capital to help build a plant, or believes he can contract for a plant more cheaply than building one, he should be permitted to do so. Congress wanted particularly to help the impecunious farmer, and to encourage efficiency in handling the product.

The agency association receives only a fixed charge for the services performed, and returns the net proceeds of the sales, after the deduction of the appropriate charges, to the grower. Thus, if the fruit is marketed at a higher price because of the joint marketing through the Sunkist System, that benefit accrues directly to the grower. It is the grower who still has the risk of loss on the sale of the fruit and has the opportunity for gain on the sale of the fruit.

4. The Agency Associations Are Not Dealing With Their Own Fruit, but Are Dealing With Their Growers' Fruit as Marketing Agents.

Petitioner asserts, in its Statement of the Case, that agency associations "purchase the oranges they market through Sunkist from growers for the consideration of *'cost plus a fixed fee'* per box of oranges." (Pet'r. Br. 7, Petitioner's emphasis.)

This statement is nonsensical, because the agency association is clearly not acquiring oranges by agreeing to pay its cost plus a fixed fee. No one would sell on such a basis. To the contrary, the stipulation of facts provides that the agency association receives these sums for its packing services. [R. 36.]

The fact that language of purchase and sale is used in the contract between the grower and the agency association [see R. 70] is of no particular significance in this case and has not been mentioned in the Petitioner's argument.

Whether or not there is a sale in the sense of the passing of title, it is clear that a marketing agency is created. As the facts in this case clearly demonstrate, the contract which a grower signs with an agency association designates that association, in the first instance, and ultimately Sunkist Growers, Inc. as his marketing agent.

This is in accord with recognized legal principles.

See, *e.g.*, *Irvine Company v. McColgan*, 26 Cal. 2d 160, 164 (1945);

Poultry Producers, etc. v. Barlow, 189 Cal. 278, 289 (1922); and

United States v. Rock Royal Cooperative, 307 U.S. 533, 580 (1938).

5. The Agency Association Is, in Fact, an Agent for Its Growers in Marketing the Growers' Fruit.

The Agency Association acts as the marketing agency for the growers who contract with it. It and Sunkist are "marketing agencies in common" for the various growers dealing through Sunkist. Such activity is expressly authorized by the Capper-Volstead Act.

D. The Majority Opinion of the Court Below on the Capper-Volstead Issue Is Accurate and Well Reasoned.

Petitioner has quoted at some length from the dissenting opinion in the Court of Appeal. (Pet'n Br. 15 and 17.) The quotations raise two points, both of which, we believe, are inaccurate. The dissent said (Pet'n Br. 15):

> "The principal reason offered by the majority in support of the view which I question, is its asserted belief that the question was settled in *Sunkist v. Winckler and Smith Co.* I do not so interpret that decision."

The majority quite accurately reviewed the *Winckler* case, and decided that it did not specifically decide the issue here in question, but determined that the general principles laid down in the *Winckler* case were applicable to this case. The majority specifically stated,

> "The District Court concluded, and we think correctly that under the decision of the Supreme Court in *Sunkist Growers, Inc. v. Winckler & Smith Co., supra,* Sunkist Growers Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as Appellant argues, that this issue was not specifically raised in the Winckler case. . . ." (369 F. 2d at 460.)

The majority then reviewed the *Winckler* decision, and expressly considered the challenge to the Sunkist System based upon the existence of the agency associations. It reviewed the economic benefits of the Sunkist System, and who received them, and the contract au-

thority granted by the Capper-Volstead Act, and pointed out agency associations supply services which the growers require in handling their products. The court then stated that "This is not a case where the agreement in question goes beyond the legitimate objects of processing and marketing." Thus, the majority opinion directly applies the rules of *Winckler & Smith* and *United States v. Borden Co.* (369 F. 2d at 460-461.) It also pointed out that these were not "anti-competitive activities" which are outside the "legitimate objects" of the cooperative, as defined in the *Maryland and Virginia Milk Producers* case. (369 F. 2d at 462.) The majority opinion therefore accurately characterized and applied the three previous cases in recent years which the Supreme Court has decided under the Capper-Volstead Act.

The second inaccuracy in the dissenting opinion is the quotation from that opinion (Pet'n Br. 17) as follows:

> "The stipulation [Capper-Volstead Stipulation] does *not* say that the associations were independent contractors. It recites that they were 'members' of the Sunkist system." (Emphasis by dissenting Judge.)

The stipulation of fact provides in part as follows:

> "Such agency association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled." [R. 36.]

E. United States v. Borden Co., 308 U.S. 188 (1939) Has No Application to Determination of Capper-Volstead Qualification.

The petitioner herein, and, indeed the dissenting Judge below, seem to suggest that if agency associations are simply agents for the purpose of handling oranges, the *Borden* decision says that this is a conspiracy with an outsider which would cause the loss of the Capper-Volstead qualification.

First of all, it is clear that the *Borden* case was not concerned with the Capper-Volstead qualification. The Court recites that the cooperative was qualified under the Capper-Volstead Act, but held that a qualified cooperative still might engage in conduct which constituted an illegal restraint of trade. Therefore, the case does not treat the question of qualification at all.

The situation was similar in *Maryland and Virginia Milk Producers, Inc. v. United States,* 362 U.S. 458 (1960), where the qualification as a cooperative was not at issue or challenged. The gross misconduct there was not a factor in determining Capper-Volstead qualification.

However, quite clearly the *Borden* case was dealing with an entirely different problem. In that case, the Pure Milk Association was a qualified Capper-Volstead cooperative. It was charged with a conspiracy with several major distributors, a labor union, a bottle exchange, a milk dealers' association and other persons. The complaint charged that all of these people and organizations had conspired to impose prices upon all dis-

tributors of milk in the Chicago area. This included an attempt to fix the price of milk paid by any distributor to any producer, as well as the price charged by distributors on the resale of the milk. Thus, the parties were charged with a conspiracy to fix prices for anyone dealing in milk in the Chicago area.

Sunkist is not dealing in nor attempting to set the price of fruit grown by anyone other than growers who directly receive the benefits of the cooperative marketing.

IV.
CONCLUSION.

The Petitioner concludes its brief with a suggestion that because of the possible abuses which might exist in other cases, the growers who have banded together in this case for cooperative marketing should be deprived of the benefits of the Capper-Volstead Act, *solely* because certain non-growers have been issued membership certificates. Yet these growers, including those who market through agency associations, are doing the very thing which Congress desired to encourage.

To paraphrase the language of this Court in *Sunkist Growers Inc. v. Winckler & Smith Citrus Co.*, the issuance of such membership certificates is a matter of "de minimis" importance. Such certificates do not have economic significance. This is not a case where the cooperative has been operated for the benefit of its members, as packing houses.

The Sunkist System complies with both the letter and the spirit of the Capper-Volstead Act, and the judgment of the Court of Appeals should accordingly be affirmed.

Respectfully submitted,

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APPENDIX

LEGISLATIVE HISTORY.

A. Sherman Act

On March 24, 1890, with the Senate sitting as a committee of the whole, in answer to inquiry from Senator George, Senator Sherman expressed the view that the proposed Sherman Antitrust Act would not affect associations of farmers or laborers.

> "It does not interfere with the Farmers' Alliance at all, because that is an association of farmers to advance their interests and to improve the growth and manner of production of their crops and to secure intelligent growth and to introduce new methods. No organizations in this country can be more beneficial in their character than Farmers' Alliances and farmers' associations. They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them. And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slighest degree, nor can they be included in the words of intent of the bill as now reported."
>
> (21 Cong. Rec. 2562.)

The following day, however, after stating that "I do not think it necessary" (21 Cong. Rec. 2611) he offered an amendment, attributed to Senator George, to Section 1 of the Act, which after clarification read:

> *"Provided,* That this act shall not be construed to apply to any arrangements, agreements, or com-

binations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

(21 Cong. Rec. 2612.)

The entire bill was referred to the Judiciary Committee, and when it returned to the Senate, the George Amendment, along with many others, was missing.

Although the Congressional Record of 1890 is not entirely clear as to the reasons for deletion of the George Amendment, subsequent statements by members of the Congress have set the record straight. During the debates in the House of Representatives on May 23, 1914, Mr. Sherwood of Ohio furnished the following statement on the subject:

"On February 28, 1890, Fifty-first Congress, Senator Sherman, of Ohio, introduced his antitrust bill in the Senate. It was referred to the Committee on Finance. On March 22, 1890, the Committee on Finance introduced a substitute for the Sherman bill. On March 25, 1890, Senator Morgan, of Alabama, moved to commit the bill to the Judiciary Committee; it failed to carry on a vote of 16 ayes to 28 nays. On March 25, 1890, Senator Sherman offered a priviso to be added at the end of the first section of the bill, as follows:

"*Provided,* That this act shall not be construed to apply to any arrangements, agreements, or combinations between the laborers, made with a view of lessening the number of hours of labor or the

increasing of their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of agricultural or horticultural products.

"The amendment was agreed to in the Senate without any opposing votes.

* * *

"The amendment to the act above referred to was made while the Senate was sitting in Committee of the Whole. On March 27, 1890, discussion of the bill was resumed upon the proviso exempting farmers' organizations and trade-unions from the act. The debate that day on that subject is worth more than passing attention. Senators Hoar, Edmunds, George, Sherman, and many others participated. Finally Senator Walthall, of Mississippi, moved to refer the bill and the amendment to the Committee on the Judiciary with instructions to report to the Senate within 20 days. The motion carried by a vote of 31 ayes to 28 nays.

"On April 2, 1890, the bill was reported to the Senate by the Committee on the Judiciary, but the Sherman-George amendment, which had been agreed to in Committee of the Whole on March 25, was not included in the bill. Nevertheless Senators in charge of the measure assured representatives of farmers' organizations and the trade-unions that under no possible construction would the judiciary include such organizations under the provisions of the act."

(51 Cong. Rec. 9171, emphasis added.)